

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 12-02**

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**MAHER TERMINALS, LLC**

**COMPLAINANT**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

**RESPONDENT**

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**DECLARATION OF BRYANT E. GARDNER IN SUPPORT OF MAHER TERMINALS,  
LLC'S OPPOSITION TO THE PORT AUTHORITY OF NEW YORK AND NEW  
JERSEY'S MOTION FOR PROTECTIVE ORDER**

I, Bryant E. Gardner, declare under penalty of perjury that the following is true and accurate:

1. I am an attorney at Winston & Strawn LLP.
2. I have personal knowledge of the following facts.
3. Following email exchanges, on March 9, 2016, Maher met and conferred with the Port Authority of New York and New Jersey ("Port Authority") telephonically in attempt to resolve objections raised by the Port Authority with respect to Maher's revised document requests and interrogatories required by the Scheduling Order.
4. Prior to the meet and confer conference, on March 7, 2016, counsel for the Port Authority at first refused to provide specifics about its objections to Maher's discovery requests and wrote that "[o]ur obligation under the rules is to meet and confer" and "[w]e are under no

obligation to accede to your demand to a new written work product.” Isakoff Dec., Ex. CC.

5. However, counsel for the Port Authority reconsidered his position with respect to Maher’s request for specifics and provided some additional information on March 8, 2016. Isakoff Dec., Ex. CC.
6. During the meet and confer that followed, in response to a request by counsel for the Port Authority, Maher’s counsel stated its willingness to discuss ways to streamline the scope of discovery in order to reduce the burden on the parties and streamline the proceeding.
7. Regarding depositions, Maher explained to the Port Authority during the meet and confer that it scheduled the most knowledgeable witnesses as designated by the Port Authority first, followed by the other knowledgeable witnesses identified by the Port Authority and if it unfolded that it was unnecessary to take the depositions of other witnesses then those could be avoided with proper written assurances from the Port Authority that they would not testify differently later.
8. Counsel for Maher specifically proposed how this could be accomplished with respect to depositions, but counsel for the Port Authority failed to respond to Maher’s proposal.
9. The Port Authority’s failure accords with its previous rejection of Maher’s proposal in May 2012, at the outset of this proceeding, to refrain from third-party discovery. Complainant’s Rule 201 Report (May 14, 2012) (“the Port Authority does not agree to Maher’s proposal to refrain from issuing third-party subpoenas”).
10. During the meet and confer, counsel for the Port Authority also complained about the temporal scope of Maher’s discovery requests to the present and Maher explained this followed because the proceeding involved continuing violations of the Shipping Act and

that if the Port Authority had nothing to add then there was no added burden. Counsel for the Port Authority did not identify any specifics of a purported added burden nor did he respond in any meaningful way to the reasoned response of Maher. Of course, the temporal scope of the requests is also a function of the Port Authority's justification in its interrogatory answers served in 2012 that it extracted consent fees from Maher to pay for port improvements for other tenants dating back to 1948.

11. The Port Authority also demanded that Maher reduce the number of its interrogatories and asserted incorrectly that Maher had propounded more than provided by the rules. At the time of the initial interrogatories issued in this proceeding in March 2012, there was no limit to the number of interrogatories permitted by the rules, and in all events the Presiding Officer ordered the parties to issue new interrogatories. Maher then propounded fewer than the 50 interrogatories now allowed as a matter of right by the rules.

12. The allegations in the Complaint relate to continuing violations of the Shipping Act by the Port Authority, including (1) with respect to its unlawful policy, practice, and procedure to extract millions of dollars of consent fees and other consideration from Maher and a few other marine terminal operators in the port, but not other port users, and (2) the Port Authority's refusal to deal with Maher and its categorical exclusion of existing terminal operators from the marine terminal now part of the Global Terminal. In both respects, the relevant evidence establishing the violations is in the Port Authority's possession. It is the Port Authority's unlawful policies, practices, and procedures that are at issue and the burden to justify the alleged violations is the Port Authority's burden. Maher's ability to prosecute its claims is frustrated by the Port Authority's refusal to

provide discovery and Maher is prejudiced.

13. Maher's claims in this proceeding involve ongoing injury and damages in excess of the \$136 million in unlawful consent fees and consideration extracted from Maher and important matters of economic discrimination by the monopoly Port Authority causing injury to the public interest in violation of the Shipping Act.
14. Additionally, the Port Authority has enormous resources to litigate this proceeding as it has manifested repeatedly in other proceedings before the Commission in recent years. The Port Authority enjoys total budget authority of almost \$8 billion annually including over \$36 million in "General Counsel/Law." Attached hereto as Exhibit 1 is a true and correct copy of the Port Authority's 2016 Budget Schedule.
15. Maher explained during the meet and confer that, to the extent the Port Authority claims it had already answered interrogatories or had already produced the documents requested by Maher, there was no added burden on the Port Authority.
16. Attached hereto as Exhibit 2 is a true and correct copy of Maher's Reply to Respondent's Brief Due December 9, 2011, Dkt. 08-03 (December 9, 2011) at 60–70.
17. Attached hereto as Exhibit 3 is a true and correct copy of the Port Authority's Second Set of Interrogatories, dated February 16, 2016.
18. Unfortunately, the Port Authority violated the agreement of the parties governing service in this proceeding. The Port Authority did not serve its exhibits in support of its Motion for a Protective Order so that they would be received by Maher the next day, March 11, 2016. Instead, the Federal Express record shows that counsel for the Port Authority did not deliver the exhibits to Federal Express until 7:24 p.m. on Friday, March 11, 2016, the day following the Port Authority's filing of its motion with the Commission by email on

March 10, 2016. Furthermore, counsel for the Port Authority did not effect next day delivery as also required by the agreement of the parties. Consequently, Maher did not receive the voluminous exhibits on which the motion relies until Monday March 14, 2016, and has been prejudiced by the Port Authority's failure to comply with the agreement of the parties. Counsel for the Port Authority also failed to serve and file a certificate of service with respect to the late-served voluminous exhibits.

Dated: March 17, 2016



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Bryant E. Gardner

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of March 2016, a copy of the foregoing was served  
by e-mail and Federal Express on the following:

Richard A. Rothman  
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